

**TRANSCRIBED FROM DIGITAL RECORDING**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel., )  
Bernard Lisitza, et al., )  
   )  
Plaintiffs, )  
   )  
vs.                                  ) No. 06 C 6131  
   )  
PAR PHARMACEUTICAL COMPANIES, INC., )  
et al.,                                ) Chicago, Illinois  
   )  
Defendants.                         ) May 16, 2012  
   )  
   ) 9:20 A.M.

TRANSCRIPT OF PROCEEDINGS - Hearing  
BEFORE THE HONORABLE ARLANDER KEYS, Magistrate Judge

## APPEARANCES:

For the Government: HON. PATRICK J. FITZGERALD  
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Chicago, Illinois 60604  
BY: MS. LINDA A. WAWZENSKI

For the Relator: BEHN & WYETZNER, CHARTERED  
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Suite 850  
Chicago, Illinois 60611  
BY: MR. MICHAEL J. BEHN

For Michigan: ATTORNEY GENERAL FOR THE  
STATE OF MICHIGAN  
2860 Eyde Parkway  
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BY: MS. ELIZABETH VALENTINE  
(Appearing telephonically)

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Official Court Reporter  
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**NOTE: Please notify of correct speaker identification.  
FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS  
UNINTELLIGIBLE.**

1 **APPEARANCES: Continued**

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9 Chicago, Illinois 60611  
BY: MR. ANTHONY D. DANHELKA

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1 (Proceedings held in open court: )

2 THE CLERK: 06 C 6131, United States of America, ex  
3 rel Bernard Lisitza versus Par Pharmaceuticals.

4 (Discussion off the record.)

5 THE COURT: Okay. We'll take this case.

6 State your appearances, counsel.

7 MR. BEHN: Good morning, your Honor. Michael Behn for  
8 the relator.

9 MS. WAWZENSKI: Good morning, your Honor. Linda  
10 Wawzenski for the United States.

11 THE COURT: Good morning, Ms. Wawzenski.

12 MS. JOHNSTON: Good morning, your Honor. Julianne  
13 Johnston for Par Pharmaceutical Companies, Inc.

14 THE COURT: Good morning, Ms. Johnston.

15 MR. DANHELKA: Good morning, your Honor. Anthony  
16 Danhelka for Alphapharm and Genpharm ULC.

17 THE COURT: Good morning.

18 MR. PRENDERGAST: Good morning, your Honor. Richard  
19 Prendergast for Par.

20 THE COURT: Good morning.

21 MR. DUEFFERT: Good morning, your Honor. Paul  
22 Dueffert for Par.

23 THE COURT: Good morning.

24 Alicia, are you supposed to get Ms. Elizabeth --

25 THE CLERK: Ms. Valentine?

1           THE COURT: Yes.

2           THE CLERK: Attorney General?

3           THE COURT: She's appearing from Michigan by phone.

4           THE CLERK: Yes.

5           (Brief interruption.)

6           THE COURT: Do you believe we can't dial by computer?

7           (Laughter.)

8           MS. VALENTINE: Good morning.

9           THE CLERK: Good morning. This is the courtroom of  
10          Judge Arlander Keys in Chicago.

11          MS. VALENTINE: Yes.

12          MS. VALENTINE: Assistant Attorney General  
13          Ms. Valentine?

14          MS. VALENTINE: Speaking.

15          THE COURT: Okay. Ms. Valentine, good morning. We  
16          have all the other parties represented here. And we have a  
17          motion to compel the plaintiffs's Rule 26(a) disclosure.  
18          Basically it is asking for supplemental disclosures to the  
19          original disclosures that were made by several of the  
20          defendants in this case.

21          And we have --

22          MS. VALENTINE: Good morning, and thank you for  
23          letting me appear by conference call.

24          THE COURT: Good morning.

25          I did review some of the answers to the

1 (unintelligible) disclosures and --

2 (Background noise.)

3 THE COURT: -- they are (unintelligible) short. And I  
4 think the plaintiffs, with regard to those individuals, those  
5 other agencies, that they are entitled to the names of people  
6 who were involved.

7 Right? That's what you are asking for?

8 MS. WAWZENSKI: Well, your Honor, with regard to the  
9 names of people that they have asked for, the primary focus  
10 on --

11 MS. VALENTINE: I'm sorry, I can't hear you.

12 MS. WAWZENSKI: The primary focus of the names that  
13 they are --

14 THE COURT: Can you hear now?

15 MS. VALENTINE: Now I can hear.

16 THE COURT: Turn it all the way up, Alicia.

17 All right.

18 MS. WAWZENSKI: The primary focus of the names that  
19 they are asking for are individuals from the 50 states that  
20 would have knowledge about particular Medicaid programs. But  
21 the key for me with regard to Rule 26 is we are required to  
22 present to the other side names of individuals on who we might  
23 rely for our case in chief.

24 And I'll tell the Court that we do not, the United  
25 States does not intend to rely on 50 witnesses from 50 states

1 to testify about Medicaid procedures in those individual  
2 states. And that's why we have not identified anyone in our  
3 Rule 26 disclosures.

4 We were asked specifically by the rule to tell them  
5 who we're going to rely on and who we believe, at the beginning  
6 of the case, we are going to rely on. And I'll say to the  
7 Court there is no way we're going to bring 50 witnesses to  
8 testify before Judge Gottschall in this case.

9 THE COURT: Well, it is -- in each case though there  
10 is some individual whistle blower, for lack of a better word,  
11 make disclosures to the plaintiffs that resulted in them  
12 bringing this lawsuit.

13 MS. WAWZENSKI: The one whistle blower, who is a party  
14 to the case, Mr. Lisitza, that's the only whistle blower that  
15 there is in the case.

16 THE COURT: Counsel?

17 MR. BEHN: Yes, your Honor. I mean, essentially what  
18 the defendants, in our view, are asking for is the names of  
19 perhaps the heads of the Medicaid agencies.

20 As Ms. Wawzenski has pointed out, there is no  
21 particular person who we're relying on at this point for that  
22 kind of evidence. They are asking in terms of who knows the  
23 procedures as far as Medicaid. One, we're not relying on, so  
24 common sense, we're not required by 26 to do that. But in  
25 terms of just the common sense approach --

1 MS. VALENTINE: My connection is cutting out.

2 MR. BEHN: -- there is -- they are asking for the  
3 names of either the heads of the agencies or everyone in the  
4 agency or anyone in the agency who knows this sort of thing.  
5 And that will be sorted out, if they want to propound 30(b)(6)  
6 as the typical way, in my experience, that is handled in these  
7 kind of cases.

8 THE COURT: Okay. Mr. Prendergast, this is your  
9 motion, right?

10 MR. DUEFFERT: It is our motion.

11 MS. JOHNSTON: It is our motion, your Honor. Par's  
12 motion.

13 THE COURT: Okay. So --

14 MS. JOHNSTON: So, yes.

15 THE COURT: All right.

16 MR. DUEFFERT: It is all of our motion.

17 MS. JOHNSTON: Yes.

18 THE COURT: All right. So what is your response to  
19 that? I mean, they are saying they are not going to be relying  
20 on any particular individual that they can actually say, the  
21 secretary to a particular individual is the one that we are  
22 going to be relying on. Normally that's what -- in a 26(a)  
23 disclosure that's what they would be doing if they knew.

24 Now what is your response? How can they be more  
25 specific than what they are (unintelligible)?

1 MS. JOHNSTON: Your Honor, their complaint alleges  
2 that Par induced pharmacies to submit claims, false claims to  
3 Medicaid agencies. There was someone at Medicaid processing  
4 the claims, perhaps through electronic means as their complaint  
5 alleges, who in Medicaid was -- knows about the processing of  
6 those claims, who knows about the payment of those claims, who  
7 knows about the setting of the reimbursement rates. Part of  
8 their complaint is founded on the variance in the reimbursement  
9 rates for certain formulations of three different drugs. So  
10 who at these Medicaid agencies were setting the rates, the  
11 maximum rates, at which these drugs were reimbursed. And these  
12 are all allegations in their complaint.

13 But there aren't any persons, in their initial  
14 disclosures, that could speak to any of these allegations in  
15 their complaint.

16 THE COURT: And you would possibly want to depose  
17 these people, I take it --

18 MS. JOHNSTON: Ab- --

19 THE COURT: -- that's why you would --

20 MS. JOHNSTON: Absolutely, your Honor. We're trying  
21 to get discovery moving at this point.

22 In other cases involving Medicaid agencies that we  
23 have been involved in, we would expect there to be a general  
24 head of the pharmaceutical reimbursement program that's been  
25 around for several years, we have seen in some of these states,

1 who would be quite knowledgeable about these -- about these  
2 items.

3 We'd also expect there to be a lieutenant to that  
4 person who handles the specific reimbursement rates for generic  
5 drugs in setting those maximum rates that the complaint speaks  
6 of. We'd expect there to be someone like that.

7 We'd also expect there to be someone who handles the  
8 claims processing and can speak to how each state handled the  
9 processing of these allegedly false claims to the state.

10 So those are three categories that we think would be  
11 there, but we would -- we need those names to get moving on  
12 discovery at this point. And we expect those to be part of the  
13 initial disclosures given the allegations in the complaint.

14 THE COURT: (Unintelligible) either you or  
15 Ms. Wawzenski, go on.

16 MR. BEHN: Your Honor, counsel has just described  
17 hundreds, if not thousands, of individuals within the Medicaid  
18 agencies. And a better way to resolve this, if there are  
19 specific topics they want to depose on by specific agencies,  
20 they can issue Rule 30(b)(6)s.

21 MS. WAWZENSKI: Your Honor, and the other point here  
22 is that the setting of the prices, which is the federal local  
23 limit, and then the (unintelligible), which is a Medicaid upper  
24 limit for these drugs, is statutorily set. So having  
25 individuals to testify about what the statute says is somewhat

1       useless as far as I'm concerned.

2                  The other thing to remember is that when we're talking  
3 about the processing of these claims, this is all done  
4 electronically. When you bring a prescription into Walgreen's,  
5 they put it into the system, they put your insurance  
6 information into the system, electronically that claim is  
7 paid. This is not done by a person who reviews a document.  
8 And it is all done electronically all over the country.

9                  So trying to have people testify about how the  
10 electronic system is done -- we're not alleging that there was  
11 anything improper with how the claims were submitted in the  
12 sense of getting them paid. What we're saying is that the drug  
13 was switched to a type of drug that should not have been  
14 prescribed. That the system of reimbursement itself is not at  
15 issue, and we're not claiming that there was any problem with  
16 how the claims themselves were submitted or paid. It is just  
17 that the switch was made, and, therefore, Medicaid programs  
18 paid more for the drugs than they should have paid for the  
19 drugs.

20                 And, again, as counsel for the relator has said, if  
21 they have specific places and states in which they want to  
22 ferret out particular information, they can certainly do so.  
23 But, again, in preparing our complaint and investigating the  
24 allegations that were made by the whistle blower, we do not  
25 interview individuals from the 50 state Medicaid programs. We

1 did not rely on individuals from any of the 50 state Medicaid  
2 programs.

3 So for Rule 26 purposes, we are not going to rely on  
4 those people and, therefore, we should not have the obligation  
5 to produce that information.

6 THE COURT: Well, I mean, why can't you folks rely on  
7 serving 30(b)(6) on -- as counsel has suggested, rather than  
8 wholesale, as Ms. Wawzenski has said, they didn't rely on any  
9 specific individuals in each of the states?

10 MS. JOHNSTON: Your Honor, we'd expect the --

11 THE COURT: Once you get the answer to the 30(b)(6)  
12 inquiries, then you might have the name of the individuals.  
13 Maybe.

14 MS. JOHNSTON: Maybe. Or we might be back then.

15 Your Honor, at this point we're trying to get  
16 discovery going as -- it does involve 50 states. This is going  
17 to be a big undertaking. And given the allegations in the  
18 complaint, we would expect the plaintiffs to know the  
19 individuals in the Medicaid agencies. Their common law fraud  
20 counts in the complaint, that requires reliance. Who at these  
21 agencies would speak to reliance?

22 These -- we wouldn't expect this to be a large  
23 undertaking given the allegations that would enable us to focus  
24 our discovery, focus our discovery requests, our  
25 interrogatories, our document requests that we would issue

1 before we issued -- or hope to issue before we issue 30(b)(6)  
2 notices. And having these names would allow us to figure out  
3 who during this time period at these agencies was responsible  
4 for these items.

5 And some of these things, in our experience, aren't  
6 set by statute or regulation. For example, the maximum  
7 allowable cost rates are often handled by a person in  
8 Medicaid. And we have spoken with those people in other cases,  
9 and so it is not entirely statutorily created. There are  
10 people in these agencies who speak -- speak to these matters  
11 alleged in the complaint. And we would expect those people to  
12 be readily identifiable by plaintiffs given the complaint and  
13 their allegations that -- that involves these agencies.

14 THE COURT: Ms. Valentine. You're on the phone.  
15 You're the only on the phone. Did you have any response to  
16 that?

17 MS. VALENTINE: I do, your Honor. This is Elizabeth  
18 Valentine in Michigan. Michigan even has, as part of its  
19 Medicaid False Claims Statute, a provision that says if  
20 you -- if a claim is submitted that the agency -- is a  
21 rebuttable presumption that the agency is entitled to  
22 justifiably rely on the accuracy of that information.

23 Also, by certification we can bring in all the data  
24 showing what was paid on the claim, what was submitted to be  
25 paid for the claim, what the actual reimbursement amount was

1 without calling in individual witnesses. That's part of our  
2 statute because it is so burdensome.

3 There is no one person, for instance, who actually  
4 processes these paid claims. The max prices, the maximum  
5 allowable cost prices, those are set and input into the billing  
6 system and automatically determine what price is going to be on  
7 a particular claim.

8 There is really no point in fishing around in the  
9 agency and deposing 20, 25 people about their role in how a  
10 Medicaid claim is paid because in fact these are, as when they  
11 are mentioned, electronic claims that are almost automatically  
12 paid. And we're entitled to rely on the accuracy of those  
13 claims as a matter of law.

14 And we think that there is really -- the only person I  
15 would envision calling to submit the data on what was actually  
16 paid for these claims is a document custodian or a person who  
17 signs the certification saying that these are accurate coming  
18 out of the billing system.

19 THE COURT: All right. I think (unintelligible)  
20 explanation. Normally this is the kind of information,  
21 specific information, that -- in a normal case that you would  
22 be entitled to. So you would decide who you wanted to take  
23 depositions of or who you wanted to eliminate from that  
24 process, but -- and based on the -- on the explanation that has  
25 been given by Ms. Valentine, as well as by Ms. Wawzenski, as to

1 these individuals, they are not -- apparently not relying on  
2 specific individuals.

3 To the extent that they are, you should be able to  
4 ferret this out through the 30(b)(6) process. And then after  
5 you have -- if you have -- you believe after getting the  
6 answers to the 30(b)(6) inquiries, and you could then -- not  
7 satisfied with it, then you would have a basis for compelling  
8 answers, more specific answers.

9 MS. JOHNSTON: And, your Honor, we assume this  
10 wouldn't foreclose our seeking this information in  
11 interrogatories as well.

12 THE COURT: No. Exactly. I'm going -- I'm not going  
13 to -- what I am going to do is deny your motion at this time  
14 without prejudice to renewing it after you have engaged in  
15 further discovery, both either by interrogatories or 30(b)(6)  
16 witnesses. So I'm denying it for now but without prejudice.

17 MS. JOHNSTON: Thank you, your Honor.

18 THE COURT: You're welcome.

19 MS. WAWZENSKI: Thank you, your Honor.

20 THE COURT: Do we have another status in this case?

21 MS. WAWZENSKI: We don't. This was a status date that  
22 the Court set --

23 THE COURT: All right.

24 MS. WAWZENSKI: -- sixty days ago in the hopes that  
25 we'd --

1 THE COURT: Let's set --

2 MS. WAWZENSKI: -- come back with good news of  
3 settlements.

4 THE COURT: And what -- do you have any good news?

5 MS. WAWZENSKI: It falls on Mr. Dueffert's  
6 (unintelligible) on that.

7 MR. DUEFFERT: We are (unintelligible) plaintiff  
8 turned (unintelligible) proposal so we are (unintelligible).

9 THE COURT: All right. We'll put it down for another  
10 60 days.

11 MS. WAWZENSKI: Thank you, your Honor.

12 MS. JOHNSTON: Thank you.

13 THE COURT: Sixty-day next status, Alicia.

14 So that motion is denied without prejudice. All  
15 right?

16 MR. DUEFFERT: Thank you.

17 THE COURT: You're welcome.

18 THE CLERK: Friday, July 20th at 9:00.

19 MR. BEHN: I will be out of town.

20 THE COURT: Okay. Alicia, another date.

21 THE CLERK: Monday, July 23rd at 9:00.

22 THE COURT: July 23rd, I believe that's the conference  
23 we have in Denver.

24 MR. BEHN: I'll be back the following week.

25 THE CLERK: July 30th, Monday.

1 MR. BEHN: Yeah.

2 THE COURT: Okay. July 30th, next status.

3 MS. WAWZENSKI: Thank you, your Honor.

4 MS. JOHNSTON: Thank you, your Honor.

5 MR. DANHELKA: Thank you, your Honor.

6 (Which concluded the proceedings in the above-entitled  
7 matter.)

8 CERTIFICATE

9 I HEREBY CERTIFY that the foregoing is a true, correct  
10 and complete transcript of the proceedings had at the hearing  
11 of the aforementioned cause on the day and date hereof.

12

13 /s/ **Pamela S. Warren**  
14 Official Court Reporter  
United States District Court  
Northern District of Illinois  
Eastern Division

June 6, 2012  
Date

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